UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

COMMUNICATIONS WORKERS OF AMERICA, DISTRICT 4, **and** **AT&T SERVICES, INC.**	**Case 13-CA-185708**

BRIEF FOR COMMUNICATIONS WORKERS OF AMERICA, DISTRICT 4

Communications Workers of America, District 4 (hereinafter "CWA" or "Union") hereby submits its Brief in pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations. The Union respectfully requests that the Board find that the Respondent violated Section 8(a)(5) of the Act by refusing to provide information requested by the Union that is necessary and relevant to the Union's role as designated bargaining agent. The Union also respectfully requests that the Board order Respondent to produce the information sought, i.e., the names, work location, current title and Net Credited Service (NCS) date, results and test dates for all employees who took (or who will take) the TMT III or TMTF III or their predecessor tests from January 1, 2014 through December 31, 2018.

Respectfully submitted,

s/ *Matthew R. Harris*

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BRIEF FOR COMMUNICATIONS WORKERS OF AMERICA, DISTRICT 4

I. BACKGROUND

The Charge in this matter was filed by the Union in Region 13 on October 5, 2016. A Complaint was issued by the Region on February 22, 2017. On June 16, 2017, the Parties submitted a Joint Motion to Submit Stipulated Record to the Board and Joint Stipulation of Facts. The Board granted the Parties' Motion and accepted the Joint Stipulation of Facts on August 15, 2017. The matter is now before the Board for resolution.

II. STIPULATED ISSUE

Whether the Employer has violated Section 8(a)(5) of the Act by failing and refusing to provide the Union with the following information: the names, work location, current title, Net Credit Service (NCS), test date, and test results for all employees taking the TMT II test for the periods of 1/1/2014 through implementation of the TMT III (TMTF II Results), and the TMT III test 10/1/2015 through the present.

III. STIPULATED FACTS

The following facts are not in dispute. CWA has been the bargaining representative for Respondent's "Midwest" employees, who perform telephone operations work in the states of Indiana, Michigan, Ohio, Wisconsin and Illinois. (Jnt. Stip. of Facts, p. 2, ¶10) The bargaining unit consists of approximately 20,000 employees serving in various job titles, all of whom are currently covered by a collective bargaining agreement ("CBA") effective April 12, 2015 through April 14, 2018. (*Id*. at p.3, ¶10; Ex. 5) Appendices A19 ("Employee Security Commitment" or "ESC") and A20 ("Extended Employment Opportunity Period") of the CBA

guarantee qualified employees who pass certain tests protections against layoff. (*Id*. at p. 3, ¶ 12) Specifically, if a layoff is imminent and an otherwise qualified employee passes the test at issue, the Respondent is required to maintain their employment; failing the test can result in the cessation of employment. (*Id*.)

For several years, Respondent administered tests known as the "Technical Knowledge Test" ("TKT"), "Technical Mechanical Test" ("TMT") and successor tests—"Technical Mechanical Knowledge Test – Field" (TMTF"), TMT II and the TMTF II tests. (*Id*. at p. 3, ¶13) These tests were traditional "pencil and paper" tests administered in a proctored environment. (*Id*. at p.3, ¶13)

On or about July 21, 2015, the Union was informed by Respondent that it was implementing new tests known as the TMT III and TMTF III. (*Id*. at p. 4, ¶18) Respondent also announced the new tests would be un-proctored and could be taken online at a location of the employee's own choosing. (*Id*.) Employees are not informed that the test results are confidential and Respondent has provided the employees no assertions that test results will be kept confidential. (*Id*. at p.4, ¶23)

On July 23, 2015, and on several occasions thereafter, CWA District 4 Staff Representative Ron Honse ("Honse"), submitted requests for information to Respondent's Director of Labor Relations Steven Hansen ("Hansen"). (*Id*. p. 4, ¶24) On July 30, 2015, Honse requested, inter alia, employee pass/fail rates for the TMT II, TMTF II, TMTIII and TMTFIII tests. (*Id*. Ex. 13) Hansen responded on August 19, 2015, stating, "As you know, we have long considered such tests proprietary due to the expense of developing them and the need to keep the

substance of these tests from the individuals being tested . . .” (*Id*. Ex. 14) Ultimately, Hansen provided pass rates[1]. (*Id*.)

The new TMT III and TMTF III tests were implemented at the end of August 2015. (*Id*. at p. 5, ¶30). During the first quarter of 2016, Honse received reports from various presidents of CWA local affiliates that greater numbers of employees were failing the TMT III tests as compared with prior tests. (*Id*. at p. 5, ¶ 32) On April 8, 2016, Honse requested additional information including the names, titles, and work locations of all employees that took the test in the first quarter of 2016. (*Id*. Ex. 18) On April 13, 2016, Hansen responded, asking Honse to explain why the Union needed the information. (*Id*. Ex. 19) On April 14, 2016, Honse responded,

> The Union’s position is that the requested information is, on its face, relevant . . . The TMT III test appears to be negatively impacting our members. In short, bargaining unit members that fail the TMT III are being excluded from the benefits and protections afforded under the ESC. The Union needs to assess the full extent of this problem in order to determine its course of action . . . Additionally, the Union can’t verify the accuracy of the [pass/fail] figures . . . without knowing the employees involved and the outcomes of their respective tests.

(*Id*. Ex. 20)

Additional emails were exchanged regarding Honse’s request. On April 20, 2016, Honse clarified,

> [T]he Union is not currently challenging the objectivity or accuracy of the [pass/fail rates] provided because it does not have the information necessary to formulate an opinion in this respect. That is precisely why the Union needs the information at issue.

(*Id*.)

[1] Some of the pass rates provided on this and subsequent dates contained erroneous and unreliable data according to Hansen’s own admission. This important fact is more thoroughly developed *infra*.

On May 5, 2016, Honse and Hansen attended a joint union-employer meeting. (*Id*. p. 6 ¶40) At this meeting Hansen informed Honse that the previous pass/fail rates he had provided were ***erroneous*** and included pass/fail rates for employees from an entirely different bargaining unit. (*Id*.) Hansen sent purportedly "corrected" pass/fail rates on June 17, 2016. (*Id*. Ex. 22) On June 22, 2016, Honse responded, "In light of the errors in the information originally provided, and in an effort to validate the provided data, I am still requesting the names and work locations of those members tested and their results . . ." (*Id*. Ex. 23)

After failing to offer an accommodation that allowed the Union to verify the veracity of the pass/fail percentages, Honse sent a final position letter to Hansen on September 6, 2016. (*Id*. Ex. 31). Again, Honse requested:

> (1) The names, work location, current title, and Net Credited Service ("NCS"), quarterly reports of test results and test dates for all employees taking the test for the period 1/1/2014 through implementation of the TMT III test (TMTF II Results) and 10/1/2015 through 12/31/2018.
>
> (2) The percentage of those that passed the test by quarter for both periods in item 1 above.
>
> (3) The percentage of those that failed to pass the test by quarter for both periods identified in item 1 above.
>
> (4) The names of those taking [the] test as a result of being declared surplus[2] or at risk of layoff.

(*Id*.) Hansen sent a response on September 23, 2016. (*Id*. Ex. 32) Hansen, acting on behalf of Respondent, objected to the Union's requests and specifically refused to provide the data requested in item 1. (*Id*. Ex. 32) Accordingly, the Union filed the instant charge. (*Id*. Ex. 1)

[2] The term "surplus" and "surplus employees" refer to employees at risk of being laid off.

IV. AUTHORITY AND ARGUMENT

A. The Union's Interest in Obtaining the Testing Results is Heightened Because the Information Relates Directly to the Treatment of Surplus Employees' and Their Ability to Maintain Employment Pursuant to the CBA.

Section 8(a)(5) of the Act imposes on an employer the "general obligation" to furnish a union with relevant information necessary to the union's proper performance of its duties as the collective bargaining representative, including information that the union needs to determine whether to pursue a grievance. *NLRB v. Acme Industrial Co*., 385 U.S. 432, 438 (1967); *accord Bell Telephone Laboratories, Inc*., 317 NLRB 802, 803 (1995) rev. dismissed enf. granted by 107 F.3d 862 (3rd Cir. 1997) (finding potential or probable relevance to the filing of grievance sufficient to mandate requested party produce information requested). Information requests regarding bargaining unit employees' terms and conditions of employment are "presumptively relevant" and must be provided. *U.S. Postal Service*, 365 NLRB No. 92, slip op. at 7 (2017).

Here, Honse requested, on several occasions, "the names, work location, current title, and Net Credited Service ("NCS"), quarterly reports of test results and test dates for all employees taking the test for the period 1/1/2014 through implementation of the TMT III test (TMTF II Results) and 10/1/2015 through 12/31/2018" (hereinafter "Test Results"). Honse's requests were initially prompted by the Company's implementation of a new test, the results of which potentially determined the employment status of numerous employees at risk of layoff. Honse's concerns were heightened after he began receiving reports from local affiliates that a disproportionate number of employees were failing the new test. (Jnt. Stip. of Facts p. 5, ¶26, ¶32) Later, the Union's concerns were exacerbated even further after it was revealed that pass/fail rates previously provided by the Respondent were erroneous and contained completely inaccurate information. (*Id*. at p. 6, ¶¶40-41)

As Honse made clear to Hansen, the Union's interest in obtaining the data directly relates to "surplus" employees' eligibility for benefits contained in the CBA that could secure their employment in lieu of layoff. (*Id*. at p. 6, ¶36; Ex. 20) Moreover, Respondent, on at least one occasion, acknowledged the Union's concerns, "The Company . . . understands the CWA's concerns about the changes to these tests, particularly as they are used for mobility between positions and access to the Employment Security Commitment." (*Id*. Ex. 14)

In sum, the Union's demonstrated interest in obtaining the information relates to perhaps the strongest consideration of all—the continued employment of bargaining unit members at risk of layoff under the CBA. Moreover, the reports received by Honse from local affiliates and Respondent's production of erroneous pass/fail rates further justified the Union's need to verify whether employees were being improperly excluded from the employment security commitments contained within the CBA, thereby warranting the filing of a grievance or other legal action. (*See* 365 NLRB at 11 (2017) (finding "The Union is empowered by the Act with enforcing Respondent's obligations under the CBA through the grievance process or any other legal means."); *accord United Graphics, Inc*., 281 NLRB 463, 465 (1986) (Board holding information "presumptively relevant" to the Union's role as bargaining agent and the "policing of contract terms" must be provided).

As such, the Union has demonstrated a strong interest in obtaining the Test Results; the information at issue is relevant and directly relates to the Union's obligations in policing the terms of the CBA. Therefore, the information should be provided.

B. The Employer Has Not Demonstrated a "Legitimate and Substantial" Interest Outweighing the Union's Need for the Information.

An employer raising a confidentiality concern regarding the production of information bears the burden of proof in demonstrating that the concern is (1) "legitimate and substantial" and (2) that it outweighs the heavy presumption in favor of disclosure. *Detroit Newspaper Agency*, 317 NLRB 1071, 1074 (1995). Confidential information is limited to "a few general categories," usually involving highly personal employee information or trade secrets[3]. *See* 365 NLRB at 8 (2017).

Here, the Respondent's confidentiality concern has nothing to do with protecting sensitive employee information or trade secrets. Respondent's concern instead relates to the "substantial resources devoted to the tests' development". (Jnt. Mtn. to Submit Stipulated Record to the Board and Jnt. Stip. of Facts p. 12) In the few cases that have resolved confidentiality concerns in favor of employers, those cases largely involve substantial *employee* confidentiality concerns.

For example, in *Detroit Edison Co.*, 440 U.S. 301, 304 (1979) the Supreme Court examined the Union's need for testing data relating to a "psychological aptitude" test administered by the employer. The Company administered the test and made the express commitment that each applicant's score would remain confidential. *Id*. at 317. The Court, focusing almost exclusively on the employer's promise of confidentiality and the *employees*' attendant confidentiality interests, found the testing results to be exempt from disclosure. *Id*. at 320.

[3] The test is owned and maintained by a vendor, not the Respondent. (Jnt. Stip. of Fact p. 3, ¶21) Hence, Respondent has no basis for asserting an interest in protecting any "trade secrets" relating to the test itself or the testing results.

Detroit Edison is inapplicable to the instant dispute for several reasons. First, there is no indication the test at issue in *Detroit Edison* was unproctored, as is the case here. (Jnt. Stip. of Facts p. 4, ¶¶18-19) Respondent's employees may take the test online at a time and place of their own choosing without supervision. (*Id*.) Hence, Respondent's purported concern with respect to the secrecy of test questions and answers is disingenuous; any employee taking the test can easily reproduce it. Moreover, the Union has not sought and does not seek the test questions and answers.

Second, *Detroit Edison* did not involve a situation in which an employer (1) admitted to providing errant data in response to a union's request for information, and then (2) deprived the union of information that would allow it to verify the accuracy of the employer's responses. Here, the Respondent has provided admittedly unreliable pass/fail percentages and now seeks to deprive the Union of the only means of verification—the names of the test takers and their testing results.

Third, and perhaps most importantly, *Detroit Edison* addressed testing results relating to a "psychological aptitude" test, i.e., sensitive personal employee information. 440 U.S. at 304. In addition, employees were provided explicit assurances that individual test data and results would be kept confidential. *Id*. at 306. Here, employees are provided no assurances that testing results or testing data will be kept confidential. (Jnt. Stip. of Facts p. 4, ¶23) Hence, Respondent's "confidentiality concerns" have absolutely nothing to do with individual employee confidentiality, but instead relate to the cost of producing the test. As such, *Detroit Edison* is inapposite.

Rather, in two cases recently decided by the Board on similar facts, the Board uniformly and unanimously found that the employers violated 8(a)(5). Very recently, in *U.S. Postal*

Service, *supra*, 365 NLRB at 1, the Board (adopting the Administrative Law Judge's Decision and Order) found that the employer violated 8(a)(5) by withholding testing data that would have allowed the union to verify the veracity of erroneous seniority rankings previously provided by the employer. In *U.S. Postal Service* (365 NLRB at 1), the union requested entrance exam scores because of concerns with inaccuracies contained in the employer's seniority ranking lists. *Id*. at 6. The employer claimed the exam scores were confidential, citing employee privacy concerns. *Id*. at 4-5. The unanimous Board, upholding the ALJ, resolved this issue in favor of the union, finding the employer violated 8(a)(5) by withholding the information. *Id*. at 1.

In *U.S. Postal Service*, 359 NLRB 1052, 1055 (2013), the Board similarly found that the union's need for testing information relating to employee seniority outweighed employee confidentiality concerns. In *U.S. Postal Service*, 359 NLRB at 1052, the employer assured test participants that their personal information and test scores would remain confidential in accordance with federal law. Nevertheless, the Board applied the *Detroit Edison* balancing test in favor of the union, finding the "test scores . . . to be crucial to administering the seniority clause." *Id*. at 1054. Accordingly, the Board concluded the employer violated 8(a)(5) by withholding the information. *Id*. at 1055.

Here, the Union's need for the testing information relates directly to employees' ability to maintain their employment; surplus employees who do not pass the test lose protections under the ESC and can be denied continued employment. (Jnt. Stip. of Facts p. 3, ¶12) If, as in the two recently decided *U.S. Postal Service* cases, a union's interest in information relating to seniority standing outweighs individual employee confidentiality interests, then, as here, a Union's interest in information relating directly to surplus employees' sustained employment certainly outweighs

an employer's concern respecting test expenditures. In conclusion, Respondent does not have a legitimate and substantial interest in withholding the information at issue.

V. CONCLUSION

Respondent has violated 8(a)(5) by failing and refusing to provide the Union with pertinent and relevant information. The Board should compel Respondent to produce the information as requested by the Union.

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CERTIFICATE OF SERVICE

Pursuant to the Board's Rules and Regulations §§ 102.5(f) and (h), the undersigned hereby certifies that the Union's Brief in Support of Position was filed electronically with the Office of the Executive Secretary on September 25, 2017. A copy was also submitted to the following individuals via regular U.S. mail and email the same day.

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